

IN THE SUPREME COURT  
OF THE  
UNITED STATES

October Term, 1983

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STATE OF ARIZONA,

Petitioner,

- vs. -

DENNIS EARL ROUTHIER,

Respondent.

---

ON WRIT OF CERTIORARI TO THE SUPREME COURT  
OF THE STATE OF ARIZONA

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BRIEF IN OPPOSITION TO  
PETITION FOR WRIT OF CERTIORARI

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Attorneys for Respondent

QUESTION PRESENTED FOR REVIEW

Where the Respondent requested counsel while being interrogated by police officer, were his Fifth and Fourteenth Amendment rights violated when another officer having been advised that Respondent requested counsel reinterrogated him regarding an unrelated homicide and elicited responses regarding this homicide without Respondent having been provided counsel?

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### STATEMENT OF THE CASE

Respondent Dennis Earl Routhier was charged by indictment on October 2, 1980, with Count I, Murder, first degree, and Count II, Attempted Murder, first degree.

At trial one Robert Barrick testified that he and his father, Lawrence Barrick, were together on September 20, 1980, in a vehicle that was flagged down by an individual who was later identified as the Respondent. He requested their assistance in starting his vehicle. They agreed to assist him and eventually this vehicle was started. The three parties remained together that day drinking beer and eventually went to a canal to go swimming. Robert Barrick testified that he had gone swimming and upon returning to the truck was struck by the Respondent after he had observed his father slumped by his pick-up truck bleeding. A medical examination of Lawrence Barrick revealed that he had died of multiple blows to the head and neck inflicted by a blunt instrument. The Respondent was apprehended by the police after a high speed chase during which the Respondent's vehicle was struck by a truck and he was injured. While confined in a hospital, he was interrogated by police officers regarding this incident. He remained hospitalized for a period of time and was transferred to a detention ward in the Maricopa County Hospital. While there he was reinterviewed by one Detective Locksa during which time he made statements regarding this incident.

Respondent testified during trial that he had acted in self defense after Lawrence Barrick had attacked him. During the struggle, Barrick had tried to gouge his eye out and Respondent was forced to use a hammer to defend himself.

During the Respondent's testimony, it was revealed that while being interrogated initially by the police, he had requested an attorney. The officer interrogating him at this time was F. Jordan Barber. Detective Barber indicated that the Respondent had indeed requested counsel and when he had done so, Detective Barber ceased questioning him. Officer Locksa approached Detective Barber and indicated his desire to interrogate the Respondent. Detective Barber advised him that the Respondent had requested counsel. Officer Locksa, however, interrogated the Respondent knowing that he had requested counsel and that

counsel had not been provided him. Officer Locksa testified that he approached the Respondent while he was in custody at the detention ward of the hospital and again informed him of his rights under Miranda. Officer Locksa had indicated that he wished to interrogate him about matters other than the Barrick homicide. In response to his questions regarding these unrelated homicides, Respondent implicated himself in the Barrick homicide. His precise words were:

"I have never done anything like this before. The only reason I did what I did is that I was totally shit faced, I probably would have not even hit the old man if it hadn't been for his big mouth."

The Respondent, through counsel, had moved the court to preclude any questioning of the Respondent regarding statements made by him during this second interview. The trial judge denied that motion stating that he had already ruled on the Respondent's statements prior to trial as being voluntary and admissible. A pre-trial voluntariness hearing was conducted however the matter of the Respondent invoking his right to counsel was not addressed.

The Respondent was cross-examined regarding these statements that he made in the second interview and Detective Locksa was called to rebut the Respondent's testimony.

Respondent moved for a mistrial based upon the prosecution's questioning of the witnesses regarding the interrogation by Detective Locksa. Respondent cited Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981) in support of that motion. That motion was denied.

The jury returned a verdict of guilty as to both First Degree Murder and Attempted First Degree Murder. The trial court imposed a sentence of 21 years in prison for the Attempted Murder and a sentence of death for the Murder of Lawrence Barrick.

Respondent appealed arguing that the trial court had erred in allowing the prosecution to use statements made by him to law enforcement officers after he had requested counsel. The Arizona Supreme Court reversed Respondent's conviction for several reasons one of which was that the Respondent's Fifth and Fourteenth Amendment rights were violated when he was questioned about two unrelated homicides after having asserted a right to counsel. (State v. Routhier, \_\_\_ Ariz. \_\_\_, 669 P.2d 68 (1983).

## REASONS FOR DENYING THE WRIT

### I. THE ARIZONA SUPREME COURT DID NOT DECIDE AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN DECIDED BY THIS COURT.

Petitioner contends that the question decided by the Arizona Supreme Court is a question of federal law which has not been decided by this Court. Respondent submits that Petitioner's analysis is misdirected. Petitioner views the question presented herein as follows: "Whether the Fifth and Fourteenth Amendments prohibit officers from reapproaching an accused who has invoked his right to counsel after custodial interrogation concerning one of offense and interrogating him about an entirely different case." (Petition for Writ of Certiorari, pp. 20-21). Respondent respectfully submits to this Court that the question is much simpler, specifically: May law enforcement officials reinterrogate an accused after he has requested counsel and before counsel has been provided? That question has been specifically answered by this Court in Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981).

This Court in Edwards was extremely clear in indicating that the assertion of the right to counsel is a significant event and once exercised by the accused "the interrogation must cease until an attorney is present." (101 S.Ct. at 1885.)

Petitioner argues that there should be no "per se rule" concerning who initiated the contact between the accused and the authorities. Citing Justice Powell's concurring opinion in Edwards, Petitioner argues that the question is whether there was a free and knowing waiver of counsel before the interrogation commenced. Respondent here does not submit that Edwards created a "per se rule" but that the Court only reemphasized the ruling in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) that there is a "rigid rule that an accused's request for an attorney is per se an invocation of his Fifth Amendment rights, requiring that all interrogation cease." (emphasis added) Citing Fair v. Michael C. 442 U.S. 707, 99 S.Ct. 2560, 61 L.Ed.2d 197 (1979).

There is no question here as in Edwards that the police reinterrogated the defendant after he requested counsel in violation of that "rigid rule". This is not a new question that need be answered by this Court, this is only an application of



the Edwards doctrine. The Arizona Supreme Court was entirely correct when they observed that there was no difference between this case and the Edwards case except that the Respondent was approached by law enforcement officials on an unrelated offense. In so noting, the court stated:

The language of Edwards is unequivocal; an accused who has asserted his right to counsel "is not subject to further interrogation by the authorities until counsel has been made available to him." (451 U.S. 45, 101 S.Ct. at 1885). The rule prohibits "further interrogation." Nowhere in Edwards does the majority indicate that reinterrogation of the accused is permissible if the authorities merely shift the line of questioning to other matters or unrelated offenses. Such a rule would render the Edwards opinion meaningless and invite the ingenious officer to invent new schemes to produce colorable waivers of the Fifth Amendment rights." (State v. Routhier, 669 P.2d at 75)

As the Arizona Supreme Court certainly visualized, to allow this type of interrogation would allow complete circumvention of Edwards by the "ingenious officer." If, for example, a person is arrested for three separate burglaries and while being interrogated regarding Burglary No. 1 he invoked his right to counsel could then the ingenious police officer interrogate him regarding Burglary No. 2 and then Burglary No. 3 until such time that the defendant makes statements regarding these matters. Obviously the holding in Edwards would not allow this type of interrogation. Edwards does not hold and Respondent does not suggest that once there is an invocation of the right to counsel, there may never again be communication between an accused and the police. But Edwards has determined that once this right is invoked the police officials may not reinterrogate an accused unless and until he himself of his own volition determines that he wishes to forgo the right he has previously invoked. The majority in Edwards emphasized the importance of who initiates the second confrontation. This is obviously a very important fact to determine in deciding whether or not the accused has chosen to forgo his right. The court in Edwards was clear in stating that the defendant was not powerless to countermand his election to have counsel present or that the authorities could in no event use any incriminating statements made by him prior to having access to counsel. (101 S.Ct. at 1885, 451 U.S. at 485). The court then indicated that had Edwards initiated the meeting, nothing in the Fifth and Fourteenth Amendments would prohibit the police from listening to his voluntary volunteered statements and using them against him at trial. But when police



officers approach an accused who has invoked this right at a later time, he is again being subjected to custodial interrogation without having an access to counsel and clearly his rights to counsel have been violated. There is no distinction between this case and Edwards and, therefore, Petitioner's position that this question has not been answered by this Court is without merit.

For the above reasons, this Court should deny the Writ requested by Petitioner.

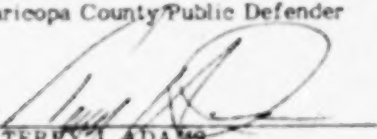
CONCLUSION

The case before this Court does not present a question of federal law which has not been settled by this Court. The issue decided by this Court was that police officers may not reinterrogate an in-custody defendant after he has requested counsel before counsel has been provided. This issue has previously been decided by this Court. For this reason, the Writ of Certiorari to the Arizona Supreme Court should be denied.

RESPECTFULLY SUBMITTED,

ROSS P. LEE  
Maricopa County Public Defender

By

  
TERRY J. ADAMS  
Deputy Public Defender  
132 South Central, 2nd Floor  
Phoenix, Arizona 85004  
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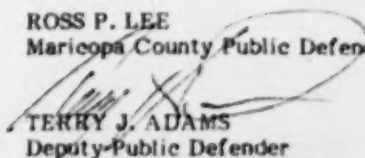
CERTIFICATE OF SERVICE

I hereby certify that one copy of the Motion for Leave to Proceed in Forma Pauperis and Affidavit, the Brief in Opposition to Petition for Writ of Certiorari to the United States Supreme Court, and the Certificate of Service were served on each of the following persons by depositing the copies in a United States post office, with first-class postage prepaid, on this 15 day of December, 1983:

WILLIAM J. SCHAFER III  
Chief Counsel, Criminal Division  
Arizona Attorney General's Office  
1275 West Washington Street  
Phoenix, Arizona 85007  
Attorney for Petitioner

I further certify that all parties required to be served have been served.

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Attorneys for Respondent

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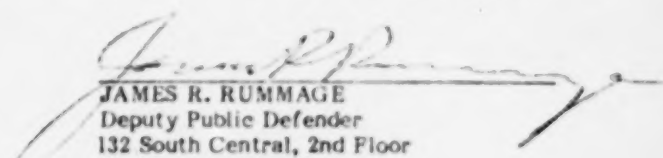
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APPEARANCE AND NOTIFICATION FORM

The Clerk will enter my appearance as counsel for Dennis Earl Routhier who  
IN THIS COURT is Respondent.

I certify that I am a member of the Bar of the Supreme Court of the United  
States:

  
JAMES R. RUMMAGE  
Deputy Public Defender  
132 South Central, 2nd Floor  
Phoenix, Arizona 85004  
Telephone: (602) 258-7711

The person to whom notification should be sent in this case is:

JAMES R. RUMMAGE  
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Phoenix, Arizona 85004  
Telephone: (602) 258-7711

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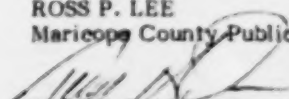
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MOTION FOR LEAVE TO PROCEED IN  
FORMA PAUPERIS

Respondent, DENNIS EARL ROUTHIER, pursuant to Rule 46, Supreme Court Rules, asks leave to file the attached Brief in Opposition to Petition for Writ of Certiorari to the Arizona Supreme Court without pre-payment of costs and to proceed in forma pauperis. The Respondent was represented by the Maricopa County Public Defender's Office, of which the undersigned is a member, in the Superior Court of Maricopa County, and on appeal to the Arizona Supreme Court. The Respondent's Affidavit in support of this motion is attached hereto.

Respectfully submitted this 12 day of December, 1983.

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AFFIDAVIT

I, DENNIS EARL ROUTHIER, being first duly sworn according to law, depose and say, that I am the Respondent in the above-entitled case; that I am currently incarcerated in the Maricopa County Jail; that in support of my motion for leave to proceed without being required to prepay fees, costs or give security therefore, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I am not presently employed; that I have not had any income in the past twelve months; that I do not own any cash, checking or savings accounts, nor any valuable property; that both before the state trial court and on appeal, I was represented by appointed counsel; that I believe the State of Arizona is not entitled to the redress sought in this case; the nature of said cause is briefly stated as follows;

I was convicted of First Degree Murder and sentenced to death. The Arizona Supreme Court reversed that conviction holding that my rights under the Fifth and Fourteenth Amendments were violated by law enforcement officials who interrogated me after I requested counsel.

I understand that a false statement in this affidavit will subject me to penalties for perjury.

*Dennis E. Routhier*  
DENNIS EARL ROUTHIER

STATE OF ARIZONA            )  
                                      )   SS.  
County of Maricopa         )

SUBSCRIBED AND SWORN to before me this 15<sup>th</sup> day of December,  
1983.

*Andrea May*  
Notary Public

My Commission Expires:

My Commission Expires Jan. 10, 1987



STATE OF ARIZONA

)

SS.

County of Maricopa

)

SUBSCRIBED AND SWORN to before me this <sup>15<sup>th</sup></sup> day of December, 1983.

*Prado May*  
Notary Public

My Commission Expires:

My Commission Expires Jan. 10, 1987

MOTION FILED  
DEC 19 1983

No. 83-837

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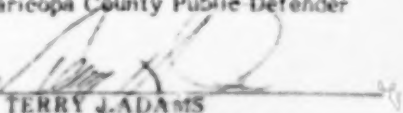
AFFIDAVIT OF FILING

TERRY J. ADAMS, being first duly sworn, upon his oath deposes and says:

That in accordance with Rule 28.2, Supreme Court Rules, he forwarded the following documents for filing to the Clerk, Supreme Court of the United States, Washington, D.C. 20543 by depositing them in a United States Post Office, with first class postage prepaid, on this 15 day of December, 1983:

- (1) Motion for Leave to Proceed in Forma Pauperis;
- (2) Affidavit in support of Motion for Leave to Proceed in Forma Pauperis;
- (3) Brief in Opposition to Petition for Writ of Certiorari;
- (4) Certificate of Service;
- (5) Appearance and Notification Form

ROSS P. LEE  
Maricopa County Public Defender

By   
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